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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

21 Cr. 443 (AKH)

5 LUKA KLASINC,

6 Defendant.

Oral Argument

7 -----x

8 New York, N.Y.

9 March 10, 2022

2:30 p.m.

10 Before:

11 HON. ALVIN K. HELLERSTEIN,

12 District Judge

13 APPEARANCES

14 DAMIAN WILLIAMS

15 United States Attorney for the
Southern District of New York

16 BY: ASHLEY C. NICOLAS

Assistant United States Attorney

17 JEFFREY H. LICHTMAN

18 Attorney for Defendant

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(Case called).

MS. NICOLAS: Good afternoon, your Honor. AUSA Ashley Nicolas for the government.

THE COURT: Good afternoon.

MR. LICHTMAN: Jeffrey Lichtman for defendant Klasinc. Good afternoon, your Honor.

THE COURT: Good afternoon, Mr. Lichtman.

Good afternoon, Mr. Klasinc.

You can all be seated.

Mr. Lichtman, this is your motion.

MR. LICHTMAN: Judge, I'm not going to belabor this. I think that it's pretty much laid out in the motions on both sides. I'll be brief.

The issue with regard to the search of the cell phone -- obviously, the standard is objective reasonableness -- and as long as the police do not coerce consent, a search conducted on the basis of consent is obviously not unreasonable.

A couple of points I want to make before I briefly get into the facts. This is obviously an examination of the totality of the circumstances to determine whether consent was the product of an individual's free and unconstrained choice rather than a mere acquiescence and a show of authority. Included in the examination in the totality of circumstances is any evidence that law enforcement officers used fraud, deceit,

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1 trickery, misrepresentation, in an effort to prompt
2 acquiescence.

3 And finally, the other point that's applicable here is
4 that courts have taken into consideration and have found
5 consent to be involuntary where defendants were not native
6 English speakers.

7 I'll be brief on the facts, but I think that they're
8 clear, Judge.

9 A lot of these cases, the searches are upheld and we
10 sort of, kind of give a wave of the hand to the fact that there
11 are situations where the officers used deceit or trickery or
12 tried to sort of bully the defendants into giving consent. If
13 you look in our papers --

14 THE COURT: Not in my court.

15 MR. LICHTMAN: Thank you.

16 And I would say this. There was no physical abuse
17 here, but the agents said to Mr. Klasinc, who was
18 understandably terrified -- he's not an American; again,
19 English is not his first languish: "We are going to search
20 your phone. You can either let us do it, or we can go through
21 the court. Do you want to give us consent to search?"

22 And on the video he's seen nodding sideways, putting
23 his hands up, and he says, "It would be a smart thing for me to
24 actually at least have some calls to see who can help me out
25 and support me and help me with communication."

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1 That doesn't stop the agents. They at some point give
2 him the consent form. They don't tell him, Look, this is the
3 consent form and you need to sign this in order to give
4 consent. They say, This is just more paperwork that we like to
5 fill out.

6 That's just dishonest, and it's an effort to minimize
7 the significance of the document in an effort to get him to
8 sign.

9 THE COURT: But he read the document.

10 MR. LICHTMAN: I understand that he read it, but
11 again, English is not his first language. He's already told
12 them that he needed help with communication.

13 THE COURT: There are no big words in the document.
14 The document is very clear. He signed it, and he does use
15 English. He came to build a business in the United States. He
16 teaches students, teaches them in English. It's hard to
17 understand why he didn't understand. He may have been
18 terrified. He may not have realized his choices, but he
19 understood.

20 MR. LICHTMAN: I think, Judge, what I would
21 respectfully say is that he understood parts of it. This was
22 not -- just because he has done some business in America
23 doesn't change the fact that he's not -- this was his first
24 arrest. There clearly was a language barrier, to some degree,
25 because he mentioned it.

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1 THE COURT: You and I would be terrified, right?
2 There isn't a defendant who is not terrified by being put in a
3 room and asked to sign an instrument.

4 MR. LICHTMAN: We'd be more terrified --

5 THE COURT: -- being afraid of the consequences.

6 MR. LICHTMAN: We'd be more terrified if it was a
7 foreign country and it wasn't our first language.

8 THE COURT: But he's been here. He's not a stranger
9 here.

10 MR. LICHTMAN: He's not a stranger, and obviously,
11 we're not here with an interpreter. I get it, Judge. I'm not
12 here to tell you that this is the motion of a lifetime, but I
13 would just say was there really a need to bully him into saying
14 we are going to search your phone; it will be done faster if
15 you give us consent; you're not going to get the phone back
16 unless you sign this now; you're not going to get it back as
17 fast.

18 They were clearly trying to manipulate him.

19 THE COURT: But all of that is true. The government
20 would be entitled to keep the phone until they can ask the
21 Court for permission; they're not going to get it right then
22 and there. There's no dissemblance. It is what it is. He
23 didn't have to give consent. He gave consent.

24 MR. LICHTMAN: Well, I would say that them telling him
25 we're going to search your phone regardless -- it's not

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1 necessarily a *fait accompli*, Judge. They still have to make an
2 application.

3 THE COURT: They didn't say that. They didn't say
4 that. They said either you will give us consent or we have to
5 make an application. The chance of getting denied on an
6 application is not great given the circumstances. I don't
7 handle these automatically and say denied. On both sides of
8 this issue, I've been reversed on the issue, and it doesn't
9 make much difference to me. I do what my conscience and the
10 law tell me to do, but the objective evaluation of the
11 circumstances here leads to only one conclusion -- that
12 Mr. Klasinc knew what he was doing, he knew when he gave
13 consent, and he gave consent.

14 The motion is denied.

15 MR. LICHTMAN: Understood, Judge.

16 THE COURT: What's next?

17 MS. NICOLAS: Your Honor, I believe at this point the
18 parties are still hopeful we'll be able to reach a pretrial
19 resolution, but I do think the government would at this time
20 ask that a trial date be set for this case. It has been
21 pending for some time.

22 THE COURT: Mr. Lichtman.

23 MR. LICHTMAN: I think that's fair, Judge. I had
24 spoken to the prosecutor before your Honor came out this
25 afternoon, and we're hopeful --

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1 THE COURT: I have down here you're Jason Goldman, and
2 I've been calling you Mr. Lichtman.

3 MR. LICHTMAN: No. I'm Lichtman, Judge.

4 THE COURT: Yes.

5 MR. LICHTMAN: He wrote the motion. I'm going to
6 blame that one on him. If we would have won, Judge, I would
7 have taken full credit. I didn't expect to, which is why I
8 didn't put a reply in, Judge.

9 THE COURT: I know you, Mr. Lichtman.

10 MR. LICHTMAN: Yes, we can continue to use him if
11 things go badly.

12 I expect to meet with the prosecutor in the next
13 couple of weeks to try to hash something out. I do not expect
14 the case to go to trial. That being said, I understand that we
15 can't leave these things hanging out forever, and I'm happy to
16 set a trial, perhaps, maybe, in the third quarter, if that's
17 possible.

18 THE COURT: I don't know if it's possible or not. We
19 can schedule one more conference --

20 MR. LICHTMAN: Thank you.

21 THE COURT: -- a month hence, and if there's no
22 disposition, we'll then set a trial date.

23 THE DEPUTY CLERK: Thursday, April 7.

24 MR. LICHTMAN: That's fine for the defense, Judge.

25 THE DEPUTY CLERK: April 7 at 2:30.

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1 THE COURT: Motion.

2 MS. NICOLAS: Yes, your Honor.

3 At this time, the government would move to exclude
4 time between today and April 7 to allow the parties to continue
5 to discuss a possible pretrial resolution.

6 THE COURT: Without objection?

7 MR. LICHTMAN: Without objection, Judge.

8 THE COURT: So ordered.

9 I thank you. If this doesn't work, we'll set a trial
10 date then.

11 MS. NICOLAS: Thank you, your Honor.

12 MR. LICHTMAN: Thank you, your Honor.

13 (Adjourned)

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